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July 1, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 15, 2004

Case No.: TIA-0060

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits, based on the employment of her late father, XXXXXXXXXXX (the Worker). The Worker was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be remanded to OWA for further processing.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note.

See 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program. 2/

The preamble to the Physician Panel Rule provides that, although an applicant "bears primary responsibility for submitting sufficient information to support his/her application," DOE "will assist applicants as it is able." 67 Fed. Reg. 52841, 52844 (2002). Accordingly, in processing applications, the OWA requests the DOE facility in question to provide information, including exposure information.

B. Factual Background

The Worker was employed as a truck driver by a DOE contractor at the DOE's Idaho site. The Worker's medical records indicate that he was born in 1913. The Worker began his employment at the site in 1951 at the age of 38; his employment ended in 1971 at the age of 58. In 1964, at the age of 51, he was diagnosed with chronic obstructive pulmonary disease (COPD). In 1975, he died at the age of 62. His death certificate lists COPD as the cause of his death.

1/ See www.dol.gov/esa.

2/ See www.eh.doe.gov/advocacy.

In the application, the Applicant claimed that the Worker acquired COPD as the result of clean-up activities following nuclear accidents. The Applicant stated that the Worker was a bus driver and that he "went into the blown reactors and helped remove the bodies. Radiation - SL-1 Fatality." Employment History at 1. A supplement to the application lists a number of sites of employment but does not identify them as sites of nuclear accidents. The supplement also lists the names and addresses of other drivers who were involved in the SL-1 reactor and are presumably potential sources of information.

The Physician Panel found that the Worker had COPD, with 1962 as the approximate date of onset, but the Panel found that the Worker's COPD was not related to his DOE employment. The Panel noted the Worker's smoking history:

The claimant began smoking in his teen years. As of 1969 he was smoking a half package of cigarettes daily. Chronic bronchitis had been evident since 1962 and emphysema was initially diagnosed in 1964. Radiographically, he had marked emphysema in 1968. Prior to that a chest radiograph in 1953 revealed only old pulmonary granulomatous disease and an old left pleuro-diaphragmatic inflammatory reaction.

Report at 1. The Panel's determination was unanimous.

In her appeal, the Applicant maintains that the Worker had significant toxic exposures:

My father was assigned as a bus driver for Idaho Nuclear, and was utilized as clean-up personnel in the case of nuclear accidents. [My father] was also flown to various other locations for clean up of their incidents, as well.

Appeal at 1. The Applicant states that her family believes that the Worker's clean-up activities "led to his premature death." *Id.* 3/

3/ The Applicant also notes that the Panel Report provided an inaccurate date of birth for the Worker. The Applicant's medical records state his correct date of birth. The Applicant does not argue that the incorrect date affected the determination and therefore we shall give this matter no further consideration.

II. Analysis

As indicated above, when an applicant files an application for physician panel review, the DOE "will assist applicants as it is able." 67 Fed. Reg. 52844. The record indicates that the DOE may have further information concerning the Worker's exposures. The application mentions the cleanup of nuclear accidents and specifically mentions the SL-1 accident, which occurred in 1961, one year before the diagnosis of his breathing problem. The SL-1 accident is discussed in material at the DOE facility web site. See <http://www.inel.gov/proving-the-principle>. Although the record indicates that the OWA requested information from the site concerning the Worker, the record does not indicate that the OWA mentioned the SL-1 incident or nuclear accidents at the site in general. Accordingly, consistent with the goal of identifying DOE information that might assist applicants, see 67 Fed. Reg. 52844, the application should be remanded so that OWA can ask the DOE site whether it has (i) information concerning the Worker's participation and exposure in the clean-up of nuclear accidents, including the accident at the SL-1 reactor, or (ii) general information concerning the exposures of workers involved in such clean-up. Upon receiving a response from the site, OWA should either arrange for further panel review or issue a determination that such review is not warranted.

Based on the foregoing, we have determined that the application should be remanded to the Office of Worker Advocacy for further consideration consistent with this decision.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0060 be, and hereby is, granted as set forth in Paragraph 2 below.
- (2) The application that is the subject of this appeal is remanded to the Office of Worker Advocacy for further processing.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 1, 2004

